DYNAWORTH SHIPPING SDN BHD

v.

LING CHUNG ANN

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[ORIGINATING MOTION NO: 25-03-2000(MR)]
14 MARCH 2001

CIVIL PROCEDURE: *Mode of commencement - Application for injunction to restrain presentation of winding-up petition - Application by way of originating motion - Whether mode of commencement authorised by law - Whether if an irregularity it is curable - Rules of the High Court 1980, O. 2 r. 1(2), (3), O. 5 r. 5*

CIVIL PROCEDURE: *Injunction - Injunction to restrain presentation of winding-up petition - Application by way of originating motion - Whether mode of commencement authorised by law - Whether if an irregularity it is curable - Rules of the High Court 1980, O. 2 r. 1(2), (3), O. 5 r. 5*

COMPANY LAW: *Winding-up - Injunction to restrain presentation of petition - Whether application can be made - Whether cause of action existed*

COMPANY LAW: *Winding-up - Taxed costs - Non-payment thereof by plaintiff company pending appeal - Whether defendant could commence winding-up proceedings against plaintiff*

In the sessions court, the defendant had claimed against the plaintiff the sum of RM148,580 for an alleged outstanding salary. Upon the application by the plaintiff, the sessions judge struck out the defendant's statement of claim with costs. However, that was reversed by the High Court. The plaintiff had since applied to the Court of Appeal for leave to appeal. In the interim period, the defendant served the plaintiff a statutory notice under s. 218 of the Companies Act 1965 as the plaintiff did not make payment for the taxed costs that was awarded by the High Court to the defendant.

The plaintiff now applied for a prohibitory injunction to restrain the presentation of a winding-up petition by the defendant. The issues were: (1) whether the plaintiff's application by way of an originating motion ('OM') was authorised by law; (2) whether the plaintiff had a cause of action against the defendant; and (3) whether the said taxed costs should only be settled upon final disposal of the case.

Held:

[1] The powers of the court under O. 2 r. 1(2) RHC to set aside any proceedings by reason of irregularity is subject to the provisions of O. 2 r. 1(3) where it is clearly provided that any proceedings begun by an originating process other than the one employed, are not void and will not be wholly set aside. Further, the fact that the proceedings were begun by originating motion and not by originating summons did not cause any embarrassment or injustice to the defendant or prejudiced the defendant's case.

[2] There existed a pre-existing cause of action on the part of the plaintiff against the defendant arising out of the statutory demand under s. 218 of the Companies Act 1965 to present a winding-up petition. Where a company wishes to defend a threatened position for winding-up, one of the processes which may be initiated by the company is to make an application to restrain the presentation of such a petition. The plaintiff does not have to wait for the actual petition for winding-up to be filed and served on him as by that time damage may have been done. The threat of the winding-up petition also constitutes a factual situation the existence of which entitles the plaintiff to obtain from the court a remedy against another.

[3] Even if the plaintiff's application for leave to the Court of Appeal was not allowed, or if allowed, was dismissed, the case would be reverted to the sessions court for a full trial and hearing. As such, the decision of the High Court in which the said costs was ordered was not a final determination of the cause or matter before the court. Taxed costs in the absence of any order to be paid forthwith should only be settled at the end of the action. It will only crystallise into a judgment debt upon the final disposal of the proceedings unless ordered otherwise.

[4] In view of the above, justice of the case warranted the grant of the injunction as the harm that would result in the refusal of it outweighed the harm that would result in its grant.

[Application allowed.]

Case(s) referred to:

Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd [1998] 2 CLJ Supp 169 ***(dist)***

Cartwright & Anor v. Baker [1975] 2 All ER 970 ***(refd)***

Hai Yue Hin v. Public Feedmill (M) Sdn Bhd (Receiver Appointed) (In Liquidation) [1997] 4 CLJ 555 ***(refd)***

Harkness v. Bell's Abestos & Engineering Ltd [1967] 2 QB 729

Ho Yoke Kwei & Anor v. Ong Eng Hin [1998] 1 CLJ 647 ***(refd)***
Instrumech Engineering Sdn Bhd v. Sensorlink Sdn Bhd [2001] 1 CLJ 132 ***(refd)***
Isyoda (M) Sdn Bhd v. Low Seong Tek [2000] 4 CLJ 621 ***(refd)***
Lee Phet Boon v. Hock Thai Finance Corporation Bhd [1994] 3 CLJ 466 ***(refd)***
Letang v. Cooper [1965] 1 QB 232 ***(foll)***
Liau Kim Lian v. Bajuria [1971] 1 MLJ 276 ***(refd)***
Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd [1990] 1 CLJ 1158 ***(dist)***
Malayan Flour Mill Bhd v. Raja Lope & Tan Co [2000] 7 CLJ 288 ***(refd)***
Salak Park Development Sdn Bhd v. Fajar Menyensing Sdn Bhd [1994] 4 CLJ 581 ***(refd)***
Stonegate Securities Ltd v. Cregory [1980] 1 All ER 241 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 218(e)
Rules of the High Court 1980, O. 2 r. 1(2), (3), O. 5 r. 5, O. 59 r. 4(1)

Other source(s) referred to:
Halsbury of England, 1996, Reissue, 4th edn, vol 7(3), p 1552, para 2211

For the plaintiff - Tai Choi Yu; M/s Tai Choi Yu & Co
For the defendant - Bong Ah Loi; M/s Bong & Co

Reported by Usha Thiagarajah

JUDGMENT

Sulaiman Daud JC:

By an originating motion dated 8 November 2000 the plaintiff applied for a prohibitory injunction to be issued against the defendant, his agent or servants or otherwise that they or he be prohibited or be restrained from applying to the court by way of petition under s. 218 of the Companies Act 1965 for a winding-up proceedings against the plaintiff company. The matter was heard on 18 January 2001 and on 2 February 2001 I delivered my brief summary judgment where I made an order in terms of the originating motion and indicated that full written judgment would be issued on appeal. As the defendant has appealed against the said decision I now give my full written judgment.

The Preliminary Objections

At the commencement of the hearing of the originating motion, counsel for the defendant raised a preliminary objection on the process adopted by the plaintiff in filing the application. The learned counsel submitted that, as provided in O. 5 r. 5 of the Rules of the High Court 1980 ('the RHC'), proceedings may only be begun by originating motion if but only if these rules

or by or under any written law the proceedings in question are required or authorised to be so begun. He further submitted that since there is no provisions under the RHC or any other written law that requires or authorises proceedings in respect of prohibitory injunction to be so begun the plaintiff has adopted the wrong procedure and that the application should be dismissed on this ground alone.

The learned counsel in support of such proposition referred to the case of *Lee Phet Boon v. Hock Thai Finance Corporation Bhd* [1994] 3 CLJ 466. In that case the plaintiff applied by way of originating motion to set aside two orders concerning sale of land. One of the preliminary objection raised by the defendant to the application was on the process adopted by the plaintiff in filing such application. It was submitted it should be by way of summons instead of by motion. The learned judge agreed with such submission and allowed the preliminary objections raised. In the instant application the learned counsel for the defendant also referred to the cases of *Isyoda (M) Sdn Bhd v. Low Seong Tek* [2000] 4 CLJ 621 and *Instrumech Engineering Sdn Bhd v. Sensorlink Sdn Bhd* [2001] 1 CLJ 132 as example of cases where application for a prohibitory injunction are made by way of originating summons. Notwithstanding the decision in *Lee Phet Boon* case, in my view, the mere fact that the application was begun by way of originating motion and not originating summons should only be treated as an irregularity and would not nullify the proceedings. This is clearly provided in O. 2 r. 1 of the RHC which reads as follows:

> 1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, or any document, judgment or order therein.
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> (2) Subject to paragraph (3) the court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealings with the proceedings generally as it thinks fit.
>
> (3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

The aforesaid rules clearly provide that any failure to comply with the requirements of the RHC shall be treated as an irregularity and shall not nullify the proceedings unless set aside by the court, wholly or in part, as irregular on an application under O. 2 r. 1(2). However the powers of the court under the said O. 2 r. 1(2) to set aside any proceedings by reason of irregularity is subject to the provisions of O. 2 r. 1(3). Under the said O. 2 r. 1(3) it is clearly provided that where any proceedings was begun by an originating process other than the one employed, such proceedings are not void and will not be wholly set aside. "Proceedings" for the purpose of this rule, include any application to the court (see *Harkness v. Bell's Abestos & Engineering Ltd.* [1967] 2 QB 729). From the aforesaid provisions it is clear to me that this application which was made by way of originating motion instead of originating summons is not void and will not be wholly set aside (if set aside at all). I am also of the view that the fact that this proceedings were begun by originating motion and not by originating summons did not cause any embarrassment or injustice to the defendant or prejudiced the defendant's case. For the reasons stated I overruled the preliminary objection.

The facts and circumstances giving rise to this application can be briefly stated. By summons filed in the sessions court the defendant herein (being the plaintiff therein) claimed against the plaintiff herein (being the defendant therein) the sum of RM148,580 for an alleged outstanding salary. On 8 November 1997 the learned sessions court judge, on application by the defendant therein (being the plaintiff herein), struck out the statement of claim with costs. On appeal, the High Court allowed the appeal with costs. The defendant proceeded with the taxation of the costs awarded by the High Court. By a Final Registrar's Certificate dated 7 August 2000, the learned senior assistant registrar has taxed the costs at RM9,895.40 to the defendant and ordered the same to be paid by the plaintiff together with interest thereon at 8% per annum from 4 February 1999 until full payment ("the taxed sum").

The plaintiff has since applied to the Court of Appeal for leave to appeal against the decision of the High Court. Upon the plaintiff's failure to pay such taxed costs, the defendant had by a letter dated 30 September 2000 through its counsel served on the plaintiff a statutory notice under s. 218 of the Companies Act 1965 demanding the full payment of the taxed costs amounting to RM11,149 (inclusive of interests) within three weeks from the date of receipt thereof, failing which the defendant will commence a winding-up proceedings against the plaintiff. In response thereto the plaintiff filed in this application.

On the facts as aforesaid three issues arise for determination, that is to say:

(a) whether the plaintiff has a cause of action against the defendant in respect of the prayer sought.

(b) whether there is any money due and payable from the plaintiff to the defendant as a judgment debt for the purpose of s. 218(e) of the Companies Act.

(c) The balance of convenience or justice of the case.

Whether The Plaintiff Has A Cause Of Action

The first ground raised by the learned counsel for the defendant for dismissing this application is that an application for an injunction requires the existence of a cause of action. In support thereof he cited several cases including *Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* [1998] 2 CLJ Supp 169, and the case of *Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd* [1990] 1 CLJ 1158. In *Arab Malaysian Corp. Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* the plaintiffs applied for an injunction to restrain the defendant from deducting liquidated and ascertained damages from sums certified as due to the plaintiffs under a building contract entered into by the parties until the final determination of the defendant's entitlement to deduct has been ascertained by arbitration. The learned judge held that any application for an injunction requires the existence of a cause of action and the mere fact that a party can apply for an injunction is in itself not a cause of action. In *Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd*, the plaintiff filed a writ of summons with only a general endorsement and then proceeded to obtain an interlocutory injunction against the defendant. The writ was never served and the defendant applied to set aside the injunction and strike out the writ and the endorsement thereon. On the grant of an injunction, Zakaria Yatim J (as he then was) stated at p. 1160:

> Since a trial is envisaged the plaintiff must show that he has a cause of action. The grant or refusal of an interlocutory injunction therefore depends on whether there is a cause of action.

Based on the aforesaid authorities the learned counsel for the defendant submitted that the plaintiff's application, seeking solely for prohibitory injunction ought to be dismissed on the ground that the plaintiff do not have a pre-existing cause of action against the defendant for substantial relief as in the instant case there is no invasion of the plaintiff's legal or equitable right. With respect I do not agree with such a contention. In the present case I am of the view that there exists a pre-existing cause of action on the part of the plaintiff against the defendant arising out of a statutory demand under s. 218

of the Companies Act 1965 to present a winding up petition. In the case of *Stonegate Securities Ltd v. Cregory* [1980] 1 All ER 241 it was held that a statutory demand is a threat to a winding-up petition. Where a company wishes to defend a threatened petition for winding up one of the process which may be initiated by the company, if it has notice that a petition will or may be presented against it, is to make an application to restrain the presentation of such petition (see *Halsbury of England*, 4th edn 1966 Reissue, vol. 7(3) at p. 1552 para 2211). The plaintiff does not have to wait for the actual petition for winding-up to be filed and served on him as by that time damage may have been done (see *Instrumech Engineering Sdn Bhd v. Sensorlink Sdn Bhd* [2001] 1 CLJ 132 at p. 139). I am also of the view that the threat by the defendant of such winding-up petition also constitutes a factual situation the existence of which entitles the plaintiff to obtain from the court a remedy against another. As such it falls within the definition of "cause of action" as defined by Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232 at p. 242.

With regard to the two cases earlier referred to by the learned counsel for the defendant, in my view the facts in those cases are readily distinguishable from the instant case. In those cases there were no threat or invasion of the plaintiffs' legal or equitable right, as in the instant case. In *Lim Chong Construction Co Sdn Bhd v. Silam Quarry Sdn Bhd* the injunctions sought was to restrain the defendant from claiming a banker guarantee given by the plaintiff to the defendant. Likewise in *Arab Malaysian Corp Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* the injunction sought is to restrain the defendant from deducting liquidated and ascertained damages under a building contract entered between the parties. It is clear to me that in both cases the injunction sought is to preserve a *status quo* pending the ascertainment by the court of the rights of the parties as distinct from the injunction sought in the instant case to restrain the defendant from doing or threatening to do an act which are calculated to cause damage to the plaintiff.

For the reasons above stated I hold that there exists in the instant case a factual situation which entitles the plaintiff to obtain from the court the injunction sought against the defendant.

Whether There Is Any Money Due From The Plaintiff To The Defendant As Judgment Debt

On this issue the learned counsel for the plaintiff submitted that taxed costs are not judgment debt and that all taxed costs are paid and settled on the final determination of the case or court proceedings unless the taxed costs are ordered to be paid forthwith. He further submitted that for taxed costs to be paid before the final determination of the case or a court proceeding the party demanding such payment must apply for an order of the court seeking

payment. According to the learned counsel there is no final determination of the suit in question since there is an appeal pending in relation thereto in the Court of Appeal. The learned counsel added that even if the said appeal is disallowed the case has to be reverted back to the Sessions Court for the pending direction and the full trial or hearing of the case.

In support of his contention that such taxed costs should only be paid after the final determination of the suits the learned counsel cited the case of *Hai Yue Hin v. Public Feedmill (M) Sdn Bhd (Receiver Appointed) (In Liquidation)* [1997] 4 CLJ 555. In that case an application for summary judgment made by the respondent was dismissed with costs by the learned senior assistant registrar. The notice of appeal was dismissed with costs. Although leave was granted to the respondent, appeal was never filed.

In delivering the decision of the Court of Appeal on the interpretation of O. 59 r. 4 of the RHC, Shaik Daud Md Ismail, JCA (as he then was) stated at p. 559:

> Having given our utmost consideration to the arguments and the authorities cited, we agree and adopt the interpretation given in the two decisions in *Chow Yong Hong* and *Ko Ko Ma Pony Horse Centre*, as being the more proper and true interpretation of Order 59 r. 4(1). To hold otherwise would make nonsense of the wording of the Order itself, which, as stated earlier, is clear as day. It is only when the court thinks fit to order the costs to be paid by the plaintiff forthwith that it should be so paid, otherwise it should follow the general rule in interlocutory proceedings and paid only at the conclusion of the action.

The next case cited by the learned counsel is *Cartwright and another v. Baker* [1975] 2 All ER 970 where it was held that in the case of costs the effective judgment is the decree of the court itself ordering costs to be paid, not the certificate quantifying them at a given figure. Likewise he argued in the instant case the Final Registrar's Certificate dated 7 August 2000 is not a judgment or an order for the payment of money. The learned counsel further argued since the taxed costs are not due and payable upon the final determination of the suits the statutory notice for winding-up order served by the defendant to the plaintiff is in reality intended to pressurize the plaintiff and the court has an inherent jurisdiction to prevent the abuse of process by way of an injunction. For such contention he referred to several cases, including *Salak Park Development Sdn Bhd v. Fajar Menyensing Sdn Bhd* [1994] 4 CLJ 581 and *Malayan Flour Mill Berhad v. Raja Lope and Tan Co (didakwa sebagai sebuah firma)* [2000] 7 CLJ 288.

The learned counsel for the defendant on the other hand argued that the facts of the case of *Hai Yue Hin v. Public Feedmill (M) Sdn Bhd* can be distinguished from the present case as that case involves the payment of costs pursuant to an interlocutory application whereas the present case relates to costs obtained upon appeal from the Sessions Court to the High Court. The learned counsel submitted that order obtained in an appeal from the lower court to the High Court is a final order and not an interlocutory order. In answer to the contention of plaintiff's counsel that taxed costs are not a judgment debt, the learned counsel referred to the case of *Liau Kim Lian v. Bajuria* [1971] 1 MLJ 276 where it was held that an order for payment of costs is tantamount to an order for the payment of such amount of money as may be ascertained on taxation which to a large extent is similar to a judgment for damages to be assessed. The learned counsel also relied on the case *Ho Yoke Kwei & Anor v. Ong Eng Hin* [1998] 1 CLJ 647 in support of her submission that the defendant is entitled to be paid taxed costs forthwith and not until the end of the case notwithstanding the omission of the words "to be paid forthwith".

Order 59 r. 4(1) of the RHC which deals with costs provides as follows:

> 4(1) Costs may be dealt with by the Court at any stage of the proceedings; or after the conclusion of the proceedings; and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

It is clear that the case of *Hai Yue Hin v. Public Feedmill (M) Sdn Bhd (Receiver Appointed) (In Liquidation)* involves the interpretation of the said O. 59 r. 4(1) in relation to costs awarded in an interlocutory proceedings whereas in the present case the costs in question was awarded by the High Court on an appeal from the decision of the Sessions Court in respect of an interlocutory matter. The said appeal arose from the order of the Sessions Court striking out the defendant's claim (being the plaintiff therein) where the High Court gave judgment in favour of the defendant. Even if the plaintiff's application for leave to the Court of Appeal is not allowed or, if allowed, the appeal is dismissed, the case still has to be reverted to the Sessions Court for full trial and hearing. In other words the decision of the High Court in which the said costs was ordered is not a final determination of the cause or matter before the court. In my view the principal laid down in *Hai Yue Hin v. Public Feedmill (M) Sdn Bhd (Receiver Appointed) (In Liquidation)* should also be applicable to costs awarded in an appeal arising out of an interlocutory proceedings or matter as in the instant case. I therefore agree with the learned counsel for the plaintiff that such taxed costs in the absence of any order for it to be paid forthwith should only be settled at the end of the action. In other

words it will only crystallise into a judgment debt upon the final disposal of the proceedings unless ordered otherwise in the course or at the conclusion of the proceedings relating to the suits.

Having weighed the factors abovementioned, I find that justice of this case is such that the harm that would result in the refusal of the grant of the injunction sought outweigh the harm that would result from their grant. The further conduct of this proceedings, if leave to appeal is allowed, will depend on the decision of the Court of Appeal. If the appeal is allowed than the order of the Sessions Court in setting aside the plaintiff's statement of claim will be restored and the order as to costs made by the High Court may be reversed.

Upon careful consideration of the arguments and the authorities cited and to prevent an abuse of the process of the court, I am of the view that this is a proper case for granting the injunction applied by the plaintiff. In the circumstances I allowed the plaintiff's application with costs.